Petition

81-1954

Supreme Court, U.S.
FILED
APR 22 1982
ALEXANDER L. STEVAS
CLERK

Supreme Court of the United States

October Term, 1981

No. .....

ADRIAN J. SHORT, JR.,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT J. ROTATORI
SUSAN L. GRAGEL
GOLD, ROTATORI & SCHWARTZ
Co., L.P.A.
1100 Ohio Savings Plaza
Cleveland, Ohio 44114
(216) 696-6122

Counsel for Petitioner

QUESTIONS PRESENTED

1) Whether the Government may willfully suppress exculpatory evidence from the defense without sanction where petitioner timely requested such disclosure and where the District Court specifically determined that the evidence was exculpatory and ordered the Government to release it to the defense before trial.

2) Whether a District Court is vested with authority to order the Government to release specified exculpatory evidence to the defense before trial, where the District Court upon examination found the evidence to be material and exculpatory and concluded that pretrial disclosure would not result in retaliation against Government witnesses.

3) Whether a District Court holds authority to protect the rights of an accused by imposing sanctions on the Government, including the pretrial dismissal of an indictment without prejudice, where the Government willfully violates the District Court's order to supply specific exculpatory evidence to the defense before trial.

4) Whether an accused must demonstrate a particularized and compelling need to obtain disclosure of exculpatory evidence pursuant to the decision in *Brady v. Maryland*, 373 U.S. 83 (1963), where such exculpatory evidence is contained in grand jury transcripts.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Opinions Below	2
Statement of Jurisdiction	2
Constitutional Provision Involved	2
Statutory Provision Involved	2
Statement of the Case	3
A. Pretrial Proceedings	3
B. District Court Orders	4
C. Judgment of the Court of Appeals	5
Reasons for Granting the Writ	6
I. The Decision of the Sixth Circuit Is in Conflict with the Decisions of the Courts of Appeals in Other Circuits	6
II. The Decision of the Sixth Circuit Is in Direct Conflict with the Letter and Spirit of the Court's Decision in *Brady v. Maryland*, 373 U.S. 83 (1963)	10
A. The Decision Below Authorizes Counsel for the Government to Willfully Suppress Exculpatory Evidence Before and During Trial Proceedings	10
B. The Decision Below Deprives District Courts of the Power to Supervise Judicial Proceedings and Creates Needless Burdens on the Entire Criminal Justice System	13
III. This Case Presents Important Issues about the Proper Standard for the Disclosure of Exculpatory Evidence in Grand Jury Transcripts for Resolution by this Court	15

PAGE

IV. This Case Presents a Good Vehicle for the Court to Consider and Decide the Issues Presented Herein .. 17

Conclusion 18

Appendix:

Oral Ruling of the District Court (October 20, 1980) .. A1

Opinion of the District Court (November 4, 1980) A7

Opinion of the District Court (October 19, 1980) A17

Judgment of Court of Appeals A19

TABLE OF AUTHORITIES

Cases:	PAGE
Brady v. Maryland, 373 U.S. 83 (1963)	passin
Chavis v. Rowe, 643 F.2d 1281 (7th Cir.), *cert. denied*, 102 S. Ct. 415 (1981)	9
Dennis v. United States, 384 U.S. 855 (1966)	16
Denver Policemen's Protective Association v. Lichenstein, 660 F.2d 432 (10th Cir. 1981)	12, 16
Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979)	16
Grant v. Allredge, 498 F.2d 376 (2nd Cir. 1974)	7
Moore v. Illinois, 408 U.S. 786 (1972)	14
U.S. vs Agurs, 427 U.S. 97 (1976)	14
United States v. Alberico, 604 F.2d 1315 (10th Cir.); *cert. denied*, 444 U.S. 992 (1979)	15
United States v. Bane, 583 F.2d 832 (6th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979)	4
United States v. Cawley, 630 F.2d 1345 (9th Cir. 1980)	14
United States v. Deerfield Spec. Papers, Inc., 501 F. Supp. 796 (E.D. Pn. 1980)	7
United States v. Deutsch, 373 F. Supp. 289, 290-91 (S.D.N.Y. 1974)	7
United States v. Eley, 335 F. Supp. 353 (N.D. Ga. 1972)	16
United States v. Ellsworth, 647 F.2d 957 (9th Cir. 1981), *pet. for cert. filed*, 50 U.S.L.W. 3786 (U.S. Nov. 20, 1981) (No. 81-1339)	9, 12,14,15
United States v. Fogg, 652 F.2d 559 (5th Cir. 1981)	7, 9, 14
United States v. Gantt, 617 F.2d 831, 841 (D.C. Cir. 1980)	16

	PAGE
United States v. Garcia, 625 F.2d 162, 165 (7th Cir.) *cert. denied*, 449 U.S. 923 (1980)	12, 16
United States v. Germain, 411 F. Supp. 719 (S.D. Ohio, 1975)	7
United States v. Griffin, 659 F.2d 932 (9th Cir. 1981)	14
United States v. Hawkins, 661 F.2d 436 (5th Cir. 1981)	14
United States v. Kampiles, 609 F.2d 1233 (7th Cir. 1979), *cert. denied*, 446 U.S. 954 (1980)	14
United States v. Kaplan, 554 F.2d 577 (3rd Cir. 1977)	9
United States v. Kosovsky, 506 F. Supp. 46 (W.D. Okla. 1980)	7
United States v. Mesa, 660 F.2d 1074 (5th Cir. 1981)	12, 14
United States v. Penix, 516 F. Supp. 248 (W.D. Okla. 1981)	7
United States v. Pollack, 534 F.2d 964 (D.C. Cir.) *cert. denied*, 429 U.S. 9424 (1976)	7, 8
United States v. Procter and Gamble Co., 356 U.S. 677 (1956)	16
United States v. Steffen, 641 F.2d 591 (8th Cir.) *cert. denied*, 101 S. Ct. 3091 (1981)	7, 9, 12
United States v. Ziperstein, 601 F.2d 281 (7th Cir.) *cert. denied*, 444 U.S. 1031 (1980)	15

Other Authorities:

18 U.S.C. § 2	3
29 U.S.C. § 501(C)	2, 3
Federal Rule of Criminal Procedure 6(e)	17
United States Constitution, amend. V	2

Supreme Court of the United States

October Term, 1981

No. .....

ADRIAN J. SHORT, JR.,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit reversing the decision of the District Court to dismiss the indictment without prejudice for failure of the Government to comply with the District Court's order to disclose exculpatory evidence to the defense before trial.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported but is printed in the Appendix attached hereto, *infra*, pp. A19-37. The relevant opinions of the District Court (Oral Ruling, October 20, 1980; Order, November 4, 1980; and Order, November 19, 1980) have not been reported but are reprinted in the Appendix attached hereto, *infra*. pp. A1-18.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1982. Petitioner's application for rehearing *en banc* was overruled on March 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISION INVOLVED

29 U.S.C. § 501(c):

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use

of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both.

STATEMENT OF THE CASE

A. Pretrial Proceedings

Petitioner was charged in a twenty-five count indictment with violations of 18 U.S.C. § 2 and 29 U.S.C. § 501(c). The first count charged that petitioner had conspired with others to appropriate funds from Locals 27 and 209 of the International Alliance of Theatrical Stage Employees ("IATSE"). The remaining counts charged that petitioner had committed substantive violations by accepting unauthorized expense advances from the Locals, unlawful reimbursements for his wife's travel expenses and unauthorized reimbursements for personal travel expenses.

During the lengthy investigation which preceded the indictment, several members, employees and officers of Locals 27 and 209 testified before the grand jury. These witnesses presented extensive testimony concerning travel by petitioner's wife, the memberships' awareness of vacation and travel expenditures and the authorization of those expenditures by the general memberships. (District Court Order, November 4, 1981; *infra* at Appendix p. A11).

After the indictment was issued, counsel for petitioner filed a request for discovery. The Government responded to this request by stating, *inter alia*, "the Government at this time knows of no exculpatory material, however, both the defense and the Court are assured of the Government's continued intention to comply with both the letter and spirit of *Brady v. Maryland*, . . ."

Before trial, petitioner, through counsel, specificially requested disclosure of exculpatory evidence in the grand

jury minutes. Petitioner asserted that grand jury witnesses had testified that the membership of IATSE Locals 27 and 209 had authorized payment of travel expenses for petitioner and his wife. Petitioner supported this request with affidavits from four individuals who had testified about such authorization before the grand jury. The Government admitted that "some witnesses said there was authorization" but opposed disclosure on grounds the exculpatory evidence was "vague" and "general".

The District Court initially overruled petitioner's request for disclosure of exculpatory grand jury evidence. Thereafter, the District Court reviewed a substantial portion of the grand jury record *in camera* in response to an unrelated pretrial motion by petitioner's codefendant. After completing this review, the District Court reversed its earlier decision and ordered the Government to disclose exculpatory evidence in the grand jury record to petitioner before trial.

B. District Court Orders

On October 20, 1980, the District Court issued an oral ruling which required the Government to disclose exculpatory evidence before trial (Appendix, *infra*, pp. A1-6). According to the District Court, several grand jury witnesses testified that the payment of travel expenditures for petitioner's wife had been authorized and had benefitted the Locals. The grand jury witnesses also testified that other expenditures by petitioner were approved by the membership. The District Court, citing *United States v. Bane*, 583 F.2d 832 (6th Cir. 1978) *cert denied*, 439 U.S. 1127 (1979), held that testimony which showed that the expenditures of union funds were authorized or made in the good faith belief of legitimate benefit to the union would be exculpatory. Thus, the District Court ordered the Government to produce portions of the grand jury record for examination by petitioner's counsel.

The Government subsequently urged the District Court to reconsider its disclosure order. On November 4, 1980, the District Court overruled the request for reconsideration and reiterated its decision to require pretrial disclosure of exculpatory evidence (Appendix, *infra*, at pp. A7-16).

The District Court found that the exculpatory nature of the evidence created a "compelling necessity" for the disclosure of grand jury records (Appendix, *infra*, at p. A11). Although petitioner may have had access to some of the grand jury witnesses for purposes of conducting pretrial interviews, the District Court held that the need for disclosure was not obviated because more than one year had passed since their grand jury testimony. The witnesses could not be expected to accurately recall the substance of their grand jury testimony (Appendix, *infra*, at p. A13).

Finally, the District Court reported that the record contained no evidence which suggested that the witnesses would suffer retaliation or reprisals if their grand jury testimony was released to petitioner's counsel. However, the District Court offered to reconsider the decision to disclose the grand jury testimony of any witness if the Government showed that the witness was likely to suffer retaliation as a result of the disclosure (Appendix, *infra*, at p. A9). The Government did not take advantage of this procedure for shielding witnesses from retaliation.

The Government refused to comply with the District Court's order to disclose exculpatory evidence to petitioner before trial. Following this refusal, on November 19, 1980, the District Court dismissed the indictment without prejudice (Appendix, *infra*, pp. A17-18).

C. Judgment of the Court of Appeals

On appeal by the Government to the Sixth Circuit, the Court of Appeals unanimously ruled that the District

Court had erred in ordering the pretrial disclosure of exculpatory evidence and in dismissing the indictment without prejudice following the Government's refusal to comply with the disclosure order (Appendix, *infra*, at pp. A19-37).

The Sixth Circuit held that the District Court had abused its discretion by ordering the pretrial disclosure of exculpatory evidence in grand jury minutes before requiring petitioner to demonstrate "particularized and compelling need" for the evidence. The Sixth Circuit concluded that the grand jury witnesses were vulnerable to retaliation and, thus, had an interest in maintaining the continued secrecy of their testimony. (Appendix, *infra*, at pp. A33-34).

The Sixth Circuit further held that the District Court lacked authority to order disclosure of exculpatory *Brady* materials before trial and to impose sanctions on the Government for willful refusal to comply with the disclosure order. The Sixth Circuit found that the prosecutor is the sole arbiter of *Brady* issues "before and during a trial". (Appendix, *infra*, at pp. A35-36). According to the appellate court, the suppression of exculpatory evidence by the Government only "becomes a concern of the Court after the trial is ended." (Appendix, *infra*, at p. A36). The Sixth Circuit held that an accused may only obtain redress for the suppression of exculpatory evidence by arguing for a reversal of his conviction (Appendix, *infra*, at p. A35-36).

REASONS FOR GRANTING THE WRIT

I. The Decision of the Sixth Circuit Is in Conflict with the Decisions of the Courts of Appeals in Other Circuits.

The panel below reversed the judgment of the District Court ordering the Government to disclose *Brady* materials to the defense before the start of trial and dis-

missing the indictment following the Government's willful refusal to comply with the disclosure order. The Sixth Circuit entered this decision, despite the trial court's explicit finding that grand jury records contained exculpatory evidence, that the defense could not obtain this information from other sources and that pretrial disclosure would not result in retaliation against Government witnesses. In making its decision, the Sixth Circuit announced that *Brady* did not create pretrial remedies and that an accused's only recourse for redressing a willful *Brady* violation by the Government is to seek and obtain the reversal of his conviction (Appendix, *infra*, at pp. A35-36).

The resultant holding, that a District Court lacks authority to order the Government to perform its duty to disclose *Brady* materials at any time before the end of trial, is in conflict with the principles underlying decisions of other Circuit Courts of Appeals. *See, United States v. Fogg*, 652 F.2d 559 (5th Cir. 1981); *United States v. Steffen*, 641 F.2d 591 (8th Cir.) *cert. denied*, 101 S. Ct. 3091 (1981); *United States v. Pollack*, 534 F.2d 964 (D.C. Cir.), *cert. denied*, 429 U.S. 9424 (1976); *Grant v. Allredge*, 498 F.2d 376 (2d Cir. 1974).[1]

The Second Circuit held in *Grant* that the Government has an imperative duty to disclose exculpatory evidence to the defense well in advance of trial. In that case, a bank robbery prosecution, the accused asserted that he had not been present at the scene of the crime. Eight months before trial, the defendant asked the Government

---

[1] The conflict in the circuits is mirrored in district court opinions. *See, United States v. Penix*, 516 F. Supp. 248 (W.D. Okla. 1981); *United States v. Kosovsky*, 506 F. Supp. 46 (W.D. Okla. 1980); *United States v. Germain*, 411 F. Supp, 719 (S.D. Ohio, 1975); and *United States v. Deutsch*, 373 F. Supp. 289, 290-91 (S.D. N.Y. 1974) cases in which pretrial disclosure of exculpatory evidence was strongly recommended or required. *But see, United States v. Deerfield Spec. Papers, Inc.*, 501 F. Supp. 796 (E.D. Pa. 1980).

to disclose exculpatory *Brady* material. Although the Government made a partial disclosure, it withheld evidence that an eyewitness had identified another individual in a photographic lineup. The defendant discovered this omission following his conviction and sought a new trial. On appeal, the Second Circuit held that he was entitled to a new trial, stating:

> We hold the government's failure upon pretrial request fully to disclose information which could have led trial counsel to uncover additional exculpatory evidence so pertinent that its presentation at trial might have induced a reasonable doubt of defendant's guilt in the minds of the jurors constituted a violation of the rule of *Brady v. Maryland, supra.* This governmental omission requires that we vacate the judgment of the conviction and order that a new trial be granted.
>
> 498 F.2d at 379.
>
> * * * *
>
> Here it was imperative that upon request prior to trial the complete details of the [identification] be disclosed. This information, which was held by the government, would have had a 'material bearing on defense preparation' . . . and therefore, should have been revealed well before the commencement of the trial . . . The particular disclosure might have led, had it been made well in advance of trial, to other significant information.
>
> 498 F.2d at 382.

Similarly, the District of Columbia Circuit held in *Pollack* that *Brady* commands the pretrial disclosure of exculpatory evidence in criminal proceedings. The *Pollack* Court expressly rejected the rule which has been advanced by the Sixth Circuit in the case below, *i.e.*, that defendants have no enforceable rights to discover *Brady* materials before trial, stating:

> Disclosure by the government must be made at such a time as to allow the defense to use the favorable

> material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pretrial disclosure . . .
>
> 534 F.2d at 973.

The court held that pretrial disclosure should be enforced whenever necessary to protect defendants in situations where "late disclosure would emasculate the effects of *Brady*." 534 F.2d at 973. *Accord, United States v. Steffen, supra* (exculpatory evidence must be disclosed well enough in advance to allow its evaluation, preparation and use at trial).[2]

The Fifth Circuit has established an alternative timetable for the disclosure of exculpatory evidence, a timetable which also conflicts with the holding of the Sixth Circuit below. In *Fogg*, the petitioner challenged his conviction on the ground that the Government had failed to supply exculpatory evidence until the day of trial. The Fifth Circuit rejected this contention and held: "*Brady* only requires that the defense receive the materials *prior to trial*." 652 F.2d at 558.

Confronted with the foregoing holdings of the Second, Fifth and District of Columbia Circuits (as well as consistent dicta from the Third, Seventh and Ninth Circuits),[3] the Sixth Circuit below failed or refused to even acknowledge their existence, much less attempt to explain why the decisions were distinguishable or unworthy of being followed. The Sixth Circuit simply ignored all conflicting authority.

---

[2] Several other circuits have recommended early disclosure of exculpatory evidence without affirmatively establishing such a requirement. *See, United States v. Ellsworth*, 647 F.2d 957 (9th Cir. 1981), *pet. for cert. filed*, 50 U.S.L.W. 3786 (U.S. Nov. 20, 1981) (No. 81-1339); *Chavis v. Rowe*, 643 F.2d 1281 (7th Cir.), *cert. denied*, 102 S.Ct. 415 (1981); *United States v. Kaplan*, 554 F.2d 577 (3rd Cir. 1977).

[3] *See* cases cited in footnote 1, *supra*.

It is apparent that this kind of unreasoned, unexplained conflict among the circuits has caused uncertainty and confusion in federal criminal litigation throughout the country. Lower courts have established varying timetables for the disclosure of exculpatory materials pursuant to *Brady*. Moreover, this confusion has caused Government counsel to exercise unfettered latitude in unilaterally determining the "appropriate" time for the release of exculpatory materials, disclosure times which more often than not maximize strategic disadvantages for defendants. As a result, the conflict in the circuits has generated much unnecessary litigation at the trial and appellate levels. This Court's certiorari jurisdiction was designed to remedy precisely this problem and, thus, should be invoked in this proceeding.

II. The Decision of the Sixth Circuit Is in Direct Conflict with the Letter and Spirit of the Court's Decision in Brady v. Maryland, 373 U.S. 83 (1963).

A. The Decision Below Authorizes Counsel for the Government to Willfully Suppress, Exculpatory Evidence Before and During Trial Proceedings.

The Court, in *Brady v. Maryland, supra,* expressly held that prosecutors, as a matter of substantive due process, must disclose exculpatory evidence to the defense upon demand to avoid unfair prejudice. According to the Court,

> A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile . . .' 373 U.S. at 87-88.

Thus, the Court determined that prosecutors cannot exercise unbridled discretion to grant or withhold exculpatory materials from the defense for strategic or other reasons.[4]

Despite the holding of *Brady*, the Sixth Circuit below held that the Government is the sole arbiter of the decision to disclose exculpatory evidence *before the end of the trial.* According to the court below, the problem of disclosing exculpatory evidence "exists for a prosecutor before and during a trial"; the disclosure or nondisclosure of exculpatory evidence "becomes a concern of the court after the trial has ended". (Appendix, *infra*, at p. A34-35). In other words, the Sixth Circuit has decided that District Courts may play no role in protecting an accused's due process rights until after the conclusion of trial.

The Sixth Circuit decision has grave ramifications on the administration of justice. When stripped to its essentials, the decision below authorizes Government counsel to suppress exculpatory evidence with impunity. The decision enables prosecutors to intentionally disregard pretrial orders for the disclosure of clear *Brady* materials, as occurred at the District Court level in this proceeding.[5] Moreover, the Sixth Circuit decision permits the Government to conceal exculpatory evidence throughout the trial with full knowledge that sanctions, if any, will not be imposed until after the trial has ended in a conviction.[6]

---

[4] The majority in *Brady* ruled that unintentional prosecutorial suppression of exculpatory evidence necessitated a new trial for the petitioner, even though there was substantial question about whether the concealed evidence would have changed the outcome of the trial if it had been disclosed before trial at the petitioner's request. 373 U.S. at 89-90.

[5] *See,* Appendix, *infra,* at pp. A17-18.

[6] *See,* pp. 13-15, *infra,* for petitioner's argument that post-trial remedies for *Brady* violations are without significant effect.

The disclosure of exculpatory evidence is required to guarantee that a defendant receives essential fairness at trial. *United States v. Steffen, supra.*

> After all, one of the aims of the *Brady* rule is to insure that the trier of fact considers *all* relevant evidence in reaching a conclusion as to guilt or innocence. But *Brady* is also based on the right of the defendant to prepare the best defense he can and bring to the court's attention any evidence helpful to his case. *Chavis v. Rowe,* 643 F.2d 1281, 1286 (7th Cir.), *cert. denied,* 102 S.Ct. 415 (1981).

In many cases, the decision to order disclosure of *Brady* materials requires "a careful balancing of competing interests." *United States v. Garcia,* 625 F.2d 162, 165 (7th Cir. 1980) *cert. denied* 449 U.S. 923 (1981). The materiality of the exculpatory evidence and the accused's need for disclosure must be balanced against the Government's interest in protecting witnesses and the free flow of information.[7] *Denver Policemen's Protective Association v. Lichenstein,* 660 F.2d 432 (10th Cir. 1981).

Contrary to the Sixth Circuit's conclusion below, Government counsel is ill-equipped to unilaterially perform the careful balancing required in determining the scope of *Brady* disclosures. In their roles as advocates, prosecutors fall prey to the desires to obtain strategic advantages by delaying disclosure of exculpatory evidence.[8] This tendency can only be curbed if District Courts are given discretion to supervise the disclosure of *Brady* materials and to enforce valid disclosure orders with appropriate sanctions.

---

[7] The District Court applied this balancing analysis before ordering the Government to disclose exculpatory evidence in this case. *See, Appendix, infra,* at pp. A7-14

[8] *See, e.g., United States v. Ellsworth, supra* (prosecutor admonished for withholding exculpatory evidence until moment before opening statements); *United States v. Mesa,* 660 F.2d 1074 (5th Cir. 1981) (prosecutor criticized for withholding exculpatory material during the pendency of trial).

This Court may conceivably review the decision below and conclude that the Sixth Circuit reached a *proper result*. Yet, the Sixth Circuit has stamped an imprimatur on prosecutorial misconduct in the form of willful suppression of exculpatory evidence and has single-handedly eliminated the significant protections of *Brady v. Maryland, supra*. If the decision below is to be affirmed, it should be so on the basis of a reasoned and principled analysis which does not needlessly jeopardize the due process rights of criminal defendants.

B. The Decision Below Deprives District Courts of the Power to Supervise Judicial Proceedings and Creates Needless Burdens on the Entire Criminal Justice System.

As previously discussed, this Court held that criminal defendants are entitled, *as a matter of substantive due process,* to disclosure of exculpatory evidence in the Government's files upon request. *Brady v. Maryland, supra.* Yet, the Sixth Circuit below held that petitioner was not entitled to obtain any judicial remedy for the Government's suppression of exculpatory evidence until after conviction. According to the panel, petitioner would be entitled to "rely on the *Brady* doctrine to argue for reversal claiming that the Government has suppressed exculpatory testimony . . ." (Appendix, *infra,* at pp. A34-35).

By entering this decision, the Sixth Circuit has robbed trial judges of any supervisory control over the proceedings in their courtroom. District Courts may no longer exercise discretion to enforce orders for the timely disclosure of *Brady* materials. Even in a case such as this, where the trial judge reviewed Government records and expressly found that they contained material exculpatory evidence,[9] the District Court is prevented from taking action to safeguard the rights of the defendant.

---

[9]*See,* Appendix, *infra,* at p. A11.

Instead, the District Court is required, by the decision below, to sit passively through often lengthy trial proceedings and wait until trial is concluded. At that phase, the District Court may choose to vacate the conviction, order a new trial or uphold the conviction, thereby requiring a defendant to pursue *Brady* violations on appeal.

Each of these alternatives imposes needless burdens on the judicial system and on criminal defendants. Whenever prejudicial *Brady* violations occur, criminal defendants will be forced to endure the costs and hardships of a legally invalid trial, an application for a new trial and/or an appeal and, possibly, the costs and hardships of a second trial proceeding. At the same time, District Courts, with already overwhelming workloads, will face trials which are palpably inadequate from the start with knowledge that subsequent trials will be required on the identical charges after resolution of *Brady* questions.

Moreover, the reliance of the Sixth Circuit below on the post-trial remedies for *Brady* violations – reversal of convictions – is unrealistic. As the Court has held, a conviction may only be reversed on *Brady* grounds if a review of the entire record demonstrates that the suppression of exculpatory evidence denied the defendant his rights to a fair trial. *United States v. Agurs*, 427 U.S. 97 (1976); *Moore v. Illinois*, 408 U.S. 786 (1972). Only a miniscule fraction of the reported cases in which *Brady* violations were challenged after trial have resulted in the reversal of convictions. In the vast majority of published decisions, courts recognize the occurrence of a technical *Brady* violation but affirm conviction on the ground the breach did not affect the accused's rights to a fundamentally fair trial.[10]

---

[10] *See, e.g., United States v. Hawkins*, 661 F.2d 436 (5th Cir. 1981); *United States v. Mesa, supra; United States v. Cawley*, 630 F.2d 1345 (9th Cir. 1980); *United States v. Kampiles*, 609 F.2d 1233 (7th Cir. 1979); *United States v. Griffin*, 659 F.2d 932 (9th Cir. 1981); *United States v. Fogg, supra; United States v. Ellsworth, supra.*

This result occurs even where the record demonstrates that the prosecution intentionally withheld exculpatory material until late in trial for the sole purpose of obtaining a strategic advantage.[11]

In effect, the Sixth Circuit has paid lip service to the principles of *Brady* while eliminating all effective procedures for the enforcement of those principles. It is hard to believe that the Court intended *Brady* to be applied only in rare occasions at the post-trial phase of criminal proceedings. It is equally hard to believe that *Brady* was intended to be applied in a manner which creates needless and excessive burdens on the justice system (in the form of multiplicitous trials and appeals). If, however, that is to be the case, it is essential that scope of the remedies for *Brady* violations be articulated, with explanation, in an opinion by this Court, rather than in the Sixth Circuit's cursory conclusions.

III. This Case Presents Important Issues about the Proper Standard for the Disclosure of Exculpatory Evidence in Grand Jury Transcripts for Resolution by this Court.

The Court, in *Brady v. Maryland, supra,* and its progeny required the disclosure of exculpatory evidence in prosecution files to safeguard an accused's rights to due process and an essentially fair trial. The Court established a doctrine commanding the disclosure of *all* material exculpatory evidence without regard for the source or location of such evidence.

Rule 6(e) of the Federal Rules of Criminal Procedure, however, narrowly restricts the use and disclosure of grand jury transcripts. A party seeking disclosure of grand jury transcripts is generally required to show a particularized

---

[11] *See, e.g., United States v. Ellsworth, supra; United States v. Alberico,* 604 F.2d 1315 (10th Cir. 1979); *United States v. Zipperstein,* 601 F.2d 281 (7th Cir. 1981).

and compelling need for the materials before the secrecy of the grand jury can be lifted. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979); *Dennis v. United States*, 384 U.S. 855 (1966); *United States v. Procter and Gamble Co.*, 356 U.S. 677 (1956).

The Sixth Circuit below determined that the trial court had abused its discretion by ordering the Government to release portions of the grand jury record before the defense demonstrated a particularized and compelling need for the disclosure.[12] (Appendix, *infra*, at pp. A33-34). In effect, the court below applied Rule 6(e) of the Federal Rules of Criminal Procedure to restrict petitioner's constitutional right to obtain access to grand jury records.

Other courts have considered this question and reached different results. For example, in *United States v. Gantt*, 617 F.2d 831 (D.C. Cir. 1980), the panel held that the trial court had properly released grand jury transcripts, containing exculpatory evidence, to the defense after an *in camera* inspection. Likewise, in *United States v. Eley*, 335 F. Supp. 353 (N.D. Ga. 1972), the Court ordered the disclosure of grand jury transcripts containing exculpatory evidence without requiring the accused to make an independent showing of particularized and compelling need.[13]

---

[12] The Sixth Circuit erred in making this conclusion. In fact, the District Court expressly held that the significant exculpatory nature of the evidence and the fact that more than one year had passed since the grand jury investigation (causing even those witnesses accessible to the defense to forget critical portions of their testimony) created a particularized and compelling need for disclosure. (Appendix, *infra*, at pp. A11-13).

[13] *See also, Denver Policemen's Protective Association v. Lichenstein*, 660 F.2d 432 (10th Cir. 1981) (government ordered to disclose exculpatory evidence in police investigative files because defendant's right to exculpatory information superseded officers' claimed interest in maintaining secrecy of the files); *United States v. Garcia*, 625 F.2d 162 (7th Cir. 1980) (government ordered to disclose confidential Bureau of Prison file containing exculpatory evidence).

The Court has not yet addressed the apparent conflict between an accused's due process rights to receive exculpatory evidence and the general rule protecting grand jury secrecy. Does Federal Rule of Criminal Procedure 6(e) require an accused to show particularized and compelling need for exculpatory grand jury evidence? This conflict between societal and personal interests is of such magnitude that it should not be left, as it has until now, to disaccordant resolution by the lower courts. Instead, the Court should exercise its certiorari jurisdiction to provide clear definition of the relationship between the apparently competing constitutional interests.

IV. This Case Presents a Good Vehicle for the Court to Consider and Decide the Issues Presented Herein.

The facts of this case present the competing policy interests involved in their clearest and most compelling light and, therefore, provide the Court with an optimal opportunity to consider and decide the substantial and unsettled legal issues involved. In this case, petitioner timely requested disclosure of exculpatory evidence before the scheduled trial. Initially, the Government denied having any exculpatory evidence in its possession but announced an intent to comply with *Brady* if such evidence was discovered.

Counsel for petitioner subsequently presented affidavits which demonstrated that the Government actually held exculpatory evidence in its files. The Government admitted the existence of the evidence, but argued that it was too "vague" to be exculpatory.

The District Court conducted an *in camera* review of the entire grand jury record and agreed with petitioner that the transcript contained exculpatory *Brady* material which was subject to disclosure before trial. The District Court ordered the Government to release the transcripts of specified witnesses' testimony to the defense pursuant

to protective order. The District Court announced that it would modify this disclosure ruling to protect individual witnesses if the Government established that any of the grand jury witnesses would be subjected to harassment of the entire grand jury record and agreed with petitioner or retaliation as a result of the disclosure (Appendix, *infra*, at p. A9). The Government made no effort to establish that any witness would be subjected to harassment as a result of pretrial disclosure.

Instead, Government counsel vehemently refused in open court, to comply with the disclosure order. As a result, the District Court dismissed the indictment without prejudice (Appendix, *infra*, at p. A17-18).

Even with the District Court's careful predisclosure evaluation of the grand jury record and clear efforts to impose safeguards to protect the interests of the Government, petitioner and witnesses, the Sixth Circuit ruled that the trial judge had no authority to order and enforce pretrial disclosure of *Brady* materials. In spite of the Government's clear attempt to suppress exculpatory evidence, the Sixth Circuit announced that petitioner could only assert *Brady* violations *after trial* to obtain reversal of a resultant conviction.

These facts present concrete issues involving the nature and timing of *Brady* disclosures and the rights of an accused to obtain exculpatory evidence in grand jury transcripts. The facts raise issues of constitutional magnitude and nationwide concern in their clearest light for consideration by the Court.

CONCLUSION

The central issue in this case is whether a District Court holds discretionary authority to order the Government to disclose *Brady* materials before trial and to enforce such orders. If the answer to this question is "no" (which ought not to depend on the particular circuit in

which petitioner was indicted), it should be so only after a reasoned evaluation by this Court of such a decision's effect on the administration of justice and on the rights of the accused. The Court through the exercise of its supervisory powers and certiorari jurisdiction should consider this case on the merits to fully articulate the constitutional and judicial interests involved.

Accordingly, petitioner prays that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

ROBERT J. ROTATORI
SUSAN L. GRAGEL
of GOLD, ROTATORI & SCHWARTZ
CO., L.P.A.
1100 Ohio Savings Plaza
Cleveland, Ohio 44114
(216) 696-6122

Counsel for Petitioner

Appendix

APPENDIX

RULING OF THE DISTRICT COURT

Entered October 20, 1980

Criminal Action CR 80-62

United States District Court

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA
Plaintiff

v.

ADRIAN J. SHORT, JR. and EARL L. RIEDEL
Defendants

ORAL RULING

Defendant Earl Riedel moved for an order compelling disclosure of portions of the Grand Jury record or in the alternative, for the court's *in camera* inspection of the same portions. In his supporting brief, relying on Rule 6(e) of the Fed.R.Crim.P., Mr. Riedel argues:

> There is substantial grounds for the dismissal of the indictment returned against the defendant which requires this court, it is submitted, to grant disclosure of portions of the transcript of the proceedings before the Grand Jury.

Defendant Riedel notes that in his appearance before the Grand Jury on June 12, 1979 (and previously when he appeared on April 9, 1979), the Special United States Attorney stated to the defendant:

> You yourself are not a target of any investigation. At this time, the Grand Jury has no evidence linking you to anticipated violations of federal law.

Observing that on September 24, 1979 when Mr. Riedel once more was called before the Grand Jury he was not given a similar representation, defendant Riedel then argues:

> Yet, despite the statements made to the defendant that neither the Grand Jury nor the Justice Department considered him a target of the investigation, a multi-count indictment was returned against him. This raises the spector that the Prosecutor abused his discretion and manipulated the Grand Jury so as to compel the return of the indictment against the defendant.

Having complied with the request that the court examine the Grand Jury record (at least subsequent to June 12, 1979), the court considers defendant Riedel's motion, treating it and his brief as a motion for a dismissal of the indictment based on the ground previously quoted from his brief.

The role of the District Court in reviewing evidence upon which an indictment has been based was stated in *Costello v. United States*, 350 U.S. 359 (1956). The Court refused to adopt a broad rule allowing defendants to "challenge indictments on the ground that they are not supported by adequate or competent evidence." *Id.*, at 364. See also, *Lawn v. United States*, 355 U.S. 339, 349 (1958). It is not the role of the District Court to weigh the sufficiency of the evidence before the Grand Jury.

While the court should not dismiss an indictment if there is some competent evidence to sustain it, the court may, in its discretion, dismiss or quash where *no* evidence in support of an indictment has been presented to the

Grand Jury. *See U.S. v. Tane,* 329 F. 2d 848, 853 (2d Cir. 1964); *Coppedge v. U.S.,* 311 F.2d 128, 132 (1962).

Thus, if upon inspection of the transcript of the proceedings the court determines there is any evidence at all upon which the indictment could be based, the indictment should be dismissed.

I.

Testimony was taken by the Grand Jury on July 23 and 24, August 20, 21, and 22, September 24, and October 22, all in 1979. Testimony was also taken on February 26, and 27, 1980, and March 26, 1980. Other proceedings were had on the latter date.

The bulk of the testimony related to expenses of Adrian Short Jr. paid for by local union credit cards, including payments for travel by Mr. and Mrs. Short, and vacation payments for Adrian Short, Jr., Mrs. Short, and other members of his family. Also testimony was received with reference to the weekly expense payments made to Adrian Short, Jr., discussion of the meetings of the executive board and of the general membership of Locals 27 and 209, and minutes relating to those meetings.

Insofar as Adrian Short, Jr. is concerned, witnesses were also interrogated as to how trips taken by Mr. Short, at the direction of the International, could serve to benefit the local unions.

With reference to Mr. Earl Riedel, several witnesses were questioned concerning Mr. Riedel's duties as secretary treasurer, his submission of expense statements for approval by the general membership, and his direct supervision over the financial records of the local unions.

In considering the presence or absence of some competent evidence in the Grand Jury record relating to the counts

against defendant Riedel, his fiduciary responsibility as secretary treasurer of the local unions must be borne in mind. Under 29 U.S.C. § 501(a), it was his duty as secretary treasurer taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to . . . expend the same in accordance with the constitution and by-laws and any resolutions of the governing bodies adopted thereunder.

Taking this responsibility into consideration, the Grand Jury record after June 12, 1979 reveals that competent evidence was received by the Grand Jury to support Counts II through XI, Counts XIII through XXIII and Count XXV based on 29 U.S.C. § 501(c) and Title 18 U.S.C. § 2. Also there is competent evidence to support Counts XII and XXIV in which Mr. Riedel is charged as a principal as well as an aider and abettor.

The court's examination of the transcript discloses no indication that the prosecutor "manipulated the Grand Jury so as to compel return of the indictment against the defendant."

On March 26, 1980, the transcript records Mr. Sopko's presentation, for the consideration of the Grand Jury, of one indictment against Mr. Adrian J. Short, Jr. and another against Mr. Earl Riedel. This transcript and a separate transcript covering the testimony of Donald Lundgren given on March 26 appear to indicate that Mr. Lundgren had been excused from the Grand Jury room when Mr. Sopko presented the indictments to the Grand Jury.

Hence the record of the Grand Jury does not support the suggestion that unauthorized personnel were present at the time the Grand Jury considered the indictments.

Giving full consideration to defendant Riedel's motion to dismiss the indictment, considered as to Counts II through XXV, the motion is overruled.

II.

Having read the complete record of testimony presented to the Grand Jury, the court doubts that there is any evidence in the record to support all the requisite elements of Count I, the conspiracy count. However, since the government has not had an opportunity to consider this expression of the court, ruling is reserved.

Ruling is reserved until defense counsel has an opportunity to examine the Grand Jury record. Under Rule 6(e), this court is ordering the disclosure. It is evident that the first count charging a conspiracy against defendant Earl Riedel and defendant Adrian Short, Jr. must be based on this record.

There are other reasons for the court to order that the Grand Jury record be made available for examination by counsel for each defendant. *U.S. v. Bane, Sr.*, 583 F.2d 832 (6th Cir. 1978), holds that in a 501(c) case in which the expenditure of union funds was authorized, "the government must prove . . . that the defendant lacked a good faith belief that the expenditure was for the legitimate benefit of the union." Moreover,

> whether or not the expenditure did, in fact, legitimately benefit the union is relevant both to the defendant's good faith belief therein and his fraudulent intent. *Ottley, supra*, 509 F. 2d at 671. An actual union benefit would tend to make good faith belief therein more likely and fraudulent intent less likely, and vice versa.

Concerning Mrs. Short accompanying her husband on out-of-town trips at the expense of the union, several wit-

nesses testified as to benefits to the unions that would be derived from this joint travel of Mr. and Mrs. Short. Moreover, whether this practice and the practice of Mr. Short's so-called double dipping (being paid both by the international and the local for his air fares) was known to and approved by the union membership (whether or not in writing), is the subject of much interrogation and considerable testimony of members of Locals 27 and 209.

Since all of the foregoing testimony may be exculpatory to the defendant, there is good reason to order its availability for examination by counsel for the defendant.

In *Dennis v. United States,* 384 U.S. 855, 875 (1966), in which the court approved the practice of disclosing Grand Jury testimony to defense counsel, the Court noted the possible need for protective orders in "unusual situations, such as those involving the Nation's security or clear cut dangers to individuals who are identified by the testimony produced." No possibility for government's claiming such unusual situation is perceived in this case.

For the foregoing reasons, examination of the Grand Jury record, at least as early as June 12, 1979, is authorized and ordered.

IT IS SO ORDERED.

OPINION OF THE DISTRICT COURT

Filed November 4, 1980
Criminal Action CR 80-62

United States District Court

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA
Plaintiff

v.

ADRIAN J. SHORT, JR. and EARL L. RIEDEL
Defendants

MEMORANDUM AND ORDER

The government moves for reconsideration of this court's memorandum (labeled "Oral Ruling") and order of October 20, 1980 "authorizing and ordering the disclosure of Grand Jury minutes from June 12, 1979 to date of indictment in this pending case."

I.

Relevant to the ruling under reconsideration is the strong policy of openness in labor union affairs that permeates the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). The present prosecution is based on Title V, § 501, (29 U.S.C. § 501(c)) of this Act. Thus Title I, § 101 (29 U.S.C. 411) provides a "bill of rights of members of labor organizations"; and Title II, § 201(a) requires every labor organization to adopt a constitution and bylaws, which must be filed with the Secretary of Labor together with a report enumerating many organiza-

tional details. Section 201(b) requires the filing with the Secretary of an annual financial report that contains the identified financial information Section 201(c) requires, among other things, that every labor organization "shall be under a duty enforceable at the suit of any member of such organization . . . to permit such member for just cause to examine any books, records, and accounts necessary to verify such report."

The congressional findings, purposes and policies of the Act declare the need for legislation to protect the "rights and interests of employees and the public generally as they relate to the activities of labor organizations . . . and their officers and representatives" and "to eliminate or prevent improper practices on the part of labor organizations . . . and their officers and representatives which distort and defeat the policies of the Labor-Management Relations Act, 1947, as amended.

Read together, the foregoing provisions indicate that the Act's policy of openness in the affairs of labor unions is itself a prophylaxis provided by the Act to help rid a labor union of any "improper practices of officers and representatives. Hence, in any prosecution under section 501(c), that same openness policy should apply to the testimony of members and employees who have been secretly quizzed about "improper practices."

If "improper practices" are going on in a labor union, testimony of labor union members that may identify those practices, if disclosed, helps to serve the Act's purpose of ridding the union of those practices. Even revelation of testimony that may show members' ignorance of ongoing "improper practices" helps serve the same purpose. Of course, if testimony of members or employees shows that the practices of a labor union and its officers and representatives are proper, any such exculpatory testimony, in fairness to the labor union and its officers and representatives, should be disclosed.

The antipode to the Act's openness policy is the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts." *United States v. Proctor & Gamble*, 356 U.S. 677, 681. Justice Douglas stated that one reason "is to encourage all witnesses to step forward and testify freely without fear of retaliation," and therefore that "the grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow." Hence the Court concluded that "this indispensable secrecy of grand jury proceedings . . . must not be broken except where there is a compelling necessity." Recognizing that "there are instances where that need will outweigh the countervailing policy," the Court noted that "they must be shown with particularity."

Should there be any union member of employee witness who might fear "retaliation," the court can consider any individualized request of the government to not reveal such testimony. With this protective exception, labor union members and employees testifying before a grand jury may expect their testimony to be subject to release since LMRDA ordains and fosters openness in labor union affairs. These persons do not fit the mold, described by Justice Douglas, of those who would not testify today if they "knew that the secrecy of their testimony would be lifted tomorrow." The Grand Jury "as a public institution serving the community" will not "suffer" if the testimony of labor union members and employees is unsealed. Rather the community is served when the openness policy of LMRDA is thus furthered. Therefore, it is concluded that the openness policy and purpose of LMRDA injects a relaxant in the "compelling necessity" which must be "shown with particularity" to override secrecy of labor union members and employees Grand Jury testimony in this LMRDA criminal case.

II.

In its memorandum of October 20, 1980, this court thus generally summarized some of the testimony presented to the Grand Jury:

> Concerning Mrs. Short accompanying her husband on out-of-town trips at the expense of the union, several witnesses testified as to benefits to the unions that would be derived from this joint travel of Mr. and Mrs. Short. Moreover, whether this practice and the practice of Mr. Short's so-called double dipping (being paid both by the international and the local for his air fares), was known to and approved by the union membership (whether or not in writing), is the subject of much interrogation and considerable testimony of members of Locals 27 and 209.

It was then concluded:

> Since all of the foregoing testimony may be exculpatory to the defendant, there is good reason to order its availability for examination by counsel for the defendant.

The government contends that "the Grand Jury material in question is not exculpatory or in any way favorable to the accused in this case." Government counsel then proceeds to interpret testimony bearing on the subjects identified in the court's memorandum. Government counsel thus concludes this section of its brief:

> In light of subjective, unsubstantiated and self-serving nature of these allegedly exculpatory statements, the government requests that this court reconsider its determination of their favorable nature to the defense. Moreover, the government requests that the court rereview this voluminous testimony in order to fully appreciate the nature of the specific witness' testimony. It is the government's contention that based upon such a review, the court will be able to determine that the specific statements of particular witnesses are not in fact exculpatory.

The testimony that forms the basis of the court's previously quoted evidence summary is the testimony of the eight union members and one international union official who testified at the Grand Jury after June 12, while the court has not reread the testimony of these witnesses, the court has reread its notes of their testimony. In addition, the court has now read testimony given prior to June 12, 1979 by a union member and the testimony of an official of the international union, as well as the earlier testimony of the union employee who testified after June 12, 1979. A number of the union members are or have been officers of the local unions and members of their common executive board.

Much of the testimony of these witnesses before the Grand Jury goes to union authorization of expenditures made by Mr. Short and the benefit to the local unions from such expenditures. Extensive testimony concerning Mrs. Short's accompanying Mr. Short, on membership awareness of vacation and travel expenditures, and on the authorization of those expenditures by the general membership was received by the Grand Jury. Such testimony is crucial to the proof of the charges involved herein.

Thus disclosure of such testimony, ordered pursuant to Federal Rules of Criminal Procedure, falls within the principle recognized in *Dennis v. United States,* 384 U.S. 855, 870 (1966), that "the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."

Moreover, "compelling necessity" is shown because, as the court has found, the testimony may be exculpatory to the defendant. The testimony combines statements of fact as well as opinions which, in part at least, tend to support defendant Short on one or more of the essential issues or elements that comprise one or more of the Counts II through XXV.

Because the court eventually may have to rule on whether such testimony may indeed exculpate defendant Short, the court refrains from identifying the particular segments of the testimony it has in mind. It is more prudent to permit defense counsel to develop such points by questioning at trial one or more of the subject Grand Jury witnesses. *Dennis v. United States, supra,* at 874-75 approves this procedure:

> Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate. The trial judge's function in this regard is limited to deciding whether a case has been made for production and to supervise the production.

Under these circumstances, the court declines to adopt the government request that "if some disclosure is necessary to comply with *Brady,* . . . this court solely order the disclosure of those portions and not the vast multitude of evidence clearly inculpatory if not exculpatory in nature." The Grand Jury testimony of these witnesses at some points may tend to inculpate rather than exculpate defendant Riedel. Other portions of testimony may be neutral. What is testimony that may attend to exculpate and what is testimony that may tend to inculpate raise questions that should be first argued out by opposing counsel. The court's judgment on particular pieces of testimony should be reserved until it has heard such arguments in an adversarial setting.

The government says:

> Moreover, if for some reason the defense feels they are unaware of all the people who testified before the Grand Jury concerning this case, the government will

> more than willingly take the unprecedented option of disclosing their names to defense counsel under, of course, an appropriate protective order concerning publicity or publication.

Continuing:

> Moreover, even if there should appear to be any *Brady* material found among the multitude of witnesses who appeared, the government urges that the Defense readily has access thereto by talking to the various witnesses he is already no doubt aware of.

There is some plausibility to the government's argument. However, this argument overlooks the unlikelihood, given human failure of recollection, that any of these witnesses, if now interviewed, could remember the exact questions put by government prosecutor and the precise answers given by the witness. The improbability of full recall would be heightened by the passage of over a year since the testimony has been given. Hence the precise questioning of the witness, since transcribed, has taken on a uniqueness not capable of reproduction by contemporary interviews. Nor does the content of the affidavits submitted in support of defendant Short's several motions indicate otherwise. Thus the several affidavits of John Zitello do not purport to reproduce his complete Grand Jury interrogation. Rather, those affidavits seek only to emphasize one or more of the subjects about which he was questioned before the Grand Jury.

In toto, it appears that witnesses testified who are members of the local unions, some of whom are or have been officers or members of the common executive board of both unions. Also witnesses testified who are officials of the international union, and one witness testified who is an employee of the local unions. Consistent with the conclusions of Part I and in accordance with the conclusions of Part II, the disclosure order is reaffirmed as to these witnesses; and the government is directed to disclose this testimony.

The government indicates that it will supply a list of the witnesses who testified before the Grand Jury in this matter, subject to an appropriate protective order. The government may prepare such an order and furnish the witness list to defendants. Independently, this court supplies counsel with a list of the witnesses whose transcripts of testimoney are to be released to defendant's counsel subject to a protective order (to be prepared by government counsel).

III.

In its memorandum and order of October 20, the court authorized and ordered "examination of the Grand Jury record, at least as early as June 12, 1979." Insofar as this order of disclosure involves parts of the Grand Jury record that go beyond the testimony ordered disclosed under Part II, the October 20 order of disclosure dealt with Count I – the conspiracy count. Under Part II of the memorandum of October 20, the court expressed doubts "that there is any evidence in the record to support all the requisite elements of Count I, the conspiracy count." However, ruling was reserved to give government counsel an opportunity "to consider this expression of the court" and "until defense counsel has an opportunity to examine the Grand Jury record" disclosure of which was ordered under Rule 6(e).

In its motion for reconsideration, the government argues that this court's finding of competent evidence to support Counts II through XXV "is clearly grounds to support the government's claim." Continuing:

> Simply put, if there is ample evidence to show either an agreement or criminal association between the Defendants as either principals and/or aiders and abettors to support the substantive counts, there is at least the presence of strong circumstantial evidence to support the conspiratorial agreement and overt act necessary to establish Count I's legitimacy.

This conclusion is not accepted. Indeed, circumstantial evidence may be used to prove a conspiracy. However, conspiracy and aiding and abetting are two separate crimes. *See United States v. Townes,* 512 F.2d 1057 (6th Cir. 1975). Conspiracy "involves the additional element of pre-concert and connivance not necessarily inherent in the mere joint activity common to aiding and abetting." *United States v. Peterson,* 524 F.2d 167, 174 (4th Cir. 1975).

The court has now reviewed the Grand Jury transcript of February 1979 through June 1979, and thus the entire Grand Jury record has been examined.

The gist of the offense of conspiracy charged in Count I is a combination or agreement among Short and Riedel, the alleged conspirators, to violate the provisions of 29 U.S.C. § 501(c), attended by one or more acts of one or more of the conspirators to accomplish the object of the conspiracy.

It is true that it is not necessary to show an express or formal agreement or that the conspirators, directly by written or spoken words, stated between themselves what their object or purpose was to be, nor the details thereof, or the means by which the object of purpose was to be accomplished. However, it is necessary that there be some evidence that would permit a jury to find that two or more persons in some way came to a mutual agreement to try to accomplish a common and unlawful plan.

It is this pre-concert which is absent in the Grand Jury record. Neither direct nor circumstantial proof exists in the record of any agreement to accomplish a violation of section 501(c). *Sua sponte,* this court orders the dismissal of Count I, the conspiracy count.

The government states:

> Nevertheless, even assuming that after reviewing the entire Grand Jury record, this honorable court should determine that there is a complete absence of evi-

> dence in the record to support Count I, no compelling need has been shown to this court to support its discretionary decision to require the disclosure of the Grand Jury minutes.

This court recognizes the logic of this statement insofar of the court's order of disclosure goes beyond the testimony ordered disclosed in Part II of this memorandum and order. The court modifies its original order of disclosure of the entire Grand Jury record. The order of disclosure will be limited to the transcripts identified in Part II.

IT IS SO ORDERED.

WILLIAM K. THOMAS
U.S. District Judge

OPINION OF THE DISTRICT COURT

Filed November 19, 1980
Criminal Action No. CR-80-62

United States District Court

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA
Plaintiff

v.

ADRIAN J. SHORT, JR. and EARL L. RIEDEL
Defendants

ORDER

In this court's findings and conclusions in its oral ruling of October 20, 1980 and written memorandum and order of November 4, 1980, and for the reasons and upon the grounds there stated, this court ordered the United States to disclose to the defendants, pursuant to an appropriate protective order, the Grand Jury testimony of 12 identified witnesses, all members, officers or employee, of local unions No. 27 and 209 of the International Alliance of Stage and Theatrical Employees (IATSE). On November 14, 1980, the United States informed the court of its refusal to comply. Thereupon, for the reasons and upon the grounds stated in its oral opinion of November 14, 1980, this court declared its intention to dismiss Counts II through XXV (the court having previously dismissed Count I) if the United States did not comply by Wednesday morning, November 19, 1980, with the court's Grand Jury testimony disclosure order.

The United States having refused to comply, Counts II – XXV are dismissed without prejudice; and Count I is dismissed with prejudice. As stated in the November oral opinion, the dismissal of Counts II through XXV provides a clear-cut, final order that will permit the government to pursue its announced intention to appeal this court's disclosure order. Because this court has concluded that Counts II through XXV charge indictable offenses, the dismissal of these counts is entered without prejudice to the United States hereafter seeking reindictment of the defendants on these charges.

IT IS SO ORDERED.

WILLIAM K. THOMAS

U.S. District Judge

OPINION OF THE COURT OF APPEALS

Filed February 11, 1982
No. 80-3784

United States Court of Appeals

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellant

v.

ADRIAN J. SHORT, JR. and EARL L. RIEDEL
Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of Ohio

Before: LIVELY, BROWN and MARTIN, Circuit Judges.

LIVELY, Circuit Judge. The government appeals from two orders of the district court which, together, dismissed all charges against the defendants-appellees. Short has been the business agent for many years of two Cleveland unions, Locals 27 and 209 of the International Alliance of Theatrical Stage Employees, and Riedel has been secretary-treasurer of both. Count 1 of the indictment charged the defendants with conspiring to appropriate funds from the two local unions for their own use in violation of 18 U.S.C. § 371. The remaining 24 counts charged

them with substantive violations of 29 U.S.C. § 501(c)[1] and 18 U.S.C. § 2 by accepting unlawful expense payments and reimbursements from the unions. Short was charged as a principal and Riedel as an aider and abetter. We reverse and remand for further proceedings.

I.

The defendants made separate motions for disclosure or, in the alternative, for the court to conduct an *in camera* inspection of portions of the transcript of proceedings of the special grand jury which indicted them. Short's motion was based on the assertion that some of the testimony before the grand jury was exculpatory in nature, that the prosecutor had failed to instruct the grand jury properly on the elements of the offense set forth in 29 U.S.C. § 501(c), and that this failure was of such magnitude as to require dismissal of the indictment. This motion was denied. Riedel's motion was based on claimed misconduct of the prosecutor. He alleged that at his first two appearances before the grand jury – on April 9, 1979 and June 12, 1979 – he was advised by the prosecuting attorney that he was not a target of the grand jury's investigation. When he was called before the grand jury on September 24, 1979, Riedel received no advice that he was not a target of the investigation. He was subsequently indicted on 25 counts, and contended that the prosecutor had abused his discretion and manipulated the grand jury to return the indictment. Riedel maintained that the grand jury had all the information which formed the basis of

[1] 29 U.S.C. § 501(c) (1976) provides:

(c) Embezzlement of assets; penalty

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

the indictment by June 12th, when the prosecutor was still assuring him that he was not a target.

The district court examined the grand jury transcript of proceedings and concluded there was competent evidence to support Counts 2 through 25 (the substantive charges) and found no indication that the grand jury had been manipulated. In an oral ruling the district court expressed doubt that there was any evidence in the record to support all the elements of Count 1, the conspiracy count. The court ordered disclosure of the entire grand jury transcript pursuant to Rule 6(e), Federal Rules of Criminal Procedure, and deferred final ruling on dismissal of Count 1.

Following briefing by the parties the district court entered a memorandum and order on the government's motion for reconsideration of its oral ruling. The district court reaffirmed its order of disclosure limited, however, to the testimony of members and employees of the two locals and an officer of the international union, 12 witnesses in all. In ordering disclosure, the court relied heavily on the policy of "openness in union affairs" contained in the Labor-Management Reporting and Disclosure Act of 1969 (LMRDA) of which 29 U.S.C. § 501(c) is a part. The court recognized the long-standing policy of secrecy of grand jury proceedings, but reasoned that the opposing policy of openness in union affairs "injects a relaxant" into the usual requirement that the need for disclosure be shown with particularity. The court stated that union members and employees who testify before a grand jury should expect their testimony to be made public in view of the openness requirements of the LMRDA, and that such witnesses "do not fit the mold" of those who would refuse to testify if they knew their testimony would not remain secret. Finding that some of the testimony of union members and a union employee may be exculpatory, the court ordered the entire transcript of testimony of these witnesses disclosed to the defendants.

Turning to Count 1, the court stated that it had decided *sua sponte* to dismiss the conspiracy charge. In doing so, the court noted that a conspiracy conviction requires something more than the joint action required to prove aiding and abetting—the additional element of "precon-cert and connivance." Based on its examination of the entire grand jury record, the district court concluded that "[n]either direct nor circumstantial proof exists in the record of any agreement to accomplish a violation of section 501(c)." Count 1 was dismissed with prejudice. The government advised the court that it would decline to comply with the order of disclosure. The court then dismissed Counts 2 through 25 without prejudice, and this appeal followed.

II.

The district court relied on *United States* v. *Tane*, 329 F.2d 848 (2d Cir. 1964), and *Coppedge* v. *United States*, 311 F.2d 128 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 946 (1963), in dismissing Count 1 with prejudice. In *Tane* an indictment was dismissed where the only evidence before the grand jury had ben obtained by illegal wire-tapping and the government conceded that dismissal was proper if this evidence could not be used. The court of appeals stated:

> A defendant has no right to have an indictment dismissed merely because incompetent or inadequate evidence was presented to the Grand Jury. Lawn v. United States, 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958); Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956). But a motion to dismiss or quash an indictment because of the absence or incompetency of evidence before the Grand Jury is addressed to the discretion of the trial court, and the decision to grant or deny the motion will not be reversed unless there has been an abuse of that discretion. Carrado v. United States, 93 U.S.App.

> D.C. 183, 210 F.2d 712, 717 (D.C. Cir. 1953), cert. denied 347 U.S. 1018, 74 S.Ct. 874, 98 L.Ed. 1140 (1954); Stewart v. United States, 300 F. 769, 777 (8 Cir. 1924). As long as there is some competent evidence to sustain the charge issued by the Grand Jury, an indictment should not be dismissed.

329 F.2d at 853-54 (footnote and citation omitted). In *Coppedge* the trial court denied a motion to dismiss an indictment on the ground that it was procured by fraud through the perjured testimony of one witness. In affirming, the court of appeals stated, "It is enough .. . that there is *some* competent evidence to sustain the charge issued by the Grand Jury even though other evidence before it is incompetent or irrelevant in an evidentiary sense or even false." 311 F.2d at 132 (emphasis in original).

As we have noted, the government conceded that the indictment in *Tane* should be dismissed. The dicta in *Tane* and the use of the word "some" in both opinions support the conclusion that an indictment based on *no* evidence should be dismissed. However, the Supreme Court has never formulated such a rule. The leading case on the evidentiary requirements for a valid indictment is *Costello* v. *United States,* 350 U.S. 359 (1956). *Costello* held that a defendant in a criminal case is not entitled to have an indictment quashed on the ground that all the evidence presented to the grand jury was hearsay. After reviewing the history and function of grand juries, Justice Black wrote for the Court:

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by

> the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

350 U.S. at 363 (footnote omitted).

In two subsequent cases the Supreme Court repeated its *Costello* language. In *Lawn* v. *United States*, 355 U.S. 339 (1958), the Supreme Court upheld a trial court's refusal to conduct a preliminary hearing to determine whether an indictment was based either directly or indirectly on tainted evidence. In *United States* v. *Calandra*, 414 U.S. 338 (1974), the Court held that a witness before a grand jury could not refuse to answer questions on the ground that they were based on evidence derived from an unlawful search and seizure. In so holding, the Court relied on *Costello*. This court has consistently given the *Costello* language a literal reading: "An indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial on the charge on the merits." 350 U.S. at 363. See *United States* v. *Barone*, 584 F.2d 118 (6th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *United States* v. *Ruyle*, 524 F.2d 1133 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *United States* v. *Barnes*, 313 F.2d 325 (6th Cir. 1963). In *Barone, supra*, we mentioned one reason for strict application of the rule against inquiring into the workings of a grand jury where there is no claim that it is biased or illegally constituted:

> We are especially reluctant to see the trial of criminal cases further attenuated by preliminary trials concerning the adequacy of the grand jury proceedings, a concern particularly noted in *Costello*.

584 F.2d at 125.

We are aware of only one case in which a court, in the absence of a concession by the government, has dismissed an indictment on the ground of lack of evidence before the grand jury. In *United States v. O'Shea*, 447 F.Supp. 330, 332 (S.D. Fla. 1978), the district court dismissed on finding that there "simply is no evidence sufficient to establish probable cause . . ." In doing so, the court discussed the movement for abolition of grand juries and stated that inquiries into the proceedings of a grand jury should be made for preservation of the institution. One other court has recognized the possibility of dismissing for a complete absence of evidence, but has then found some evidence when the grand jury transcripts were examined. *See United States v. Vargas-Rios*, 607 F.2d 831, 835 (9th Cir. 1979); *United States v. Romero*, 585 F.2d 391, 396 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979).[2]

In at least two cases the Fifth Circuit has upheld denials of motions for dismissal on the ground that no evidence was presented to the grand jury in support of indictments. *See United States v. Cruz*, 478 F.2d 408 (5th Cir.), *cert. denied sub nom. Aleman v. United States*, 414 U.S. 910 (1973), and *Cohen v. United States*, 436 F.2d 586 (5th Cir.), *cert. denied*, 403 U.S. 905 (1971). In *Cruz* the Court stated, "We will not review the sufficiency of the evidence, if any, supporting the grand jury indictments in this case." 478 F.2d at 412.

In the present case there was no claim by either defendant that the grand jury was biased or illegally constituted. Short merely sought disclosure of evidence which he contended was exculpatory. Riedel's charges of prosecutorial misconduct, which the district court found to have no merit, were not concerned with the evidentiary basis of the indictment. In dismissing Count 1 on its own motion

[2] In *Romero* the court relied on Justice Burton's concurring opinion in *Costello*, 350 U.S. at 364-65. We decline to follow this opinion which received support from no other member of the Court.

the district court placed too much reliance on *Tane* and *Coppedge* and too little on *Costello* and the cases we have cited from this court. The indictment against Short and Riedel was valid on its face. The grand jury was legally constituted. Count 1 should have gone to trial on the merits.

Any other rule would wreak havoc, particularly in conspiracy cases. The element of agreement, which the district court found totally unsupported by the evidence before the grand jury, is nearly always established by circumstantial evidence, as conspirators seldom make records of their illegal agreements. Since direct proof of this element is usually lacking, a decision on whether it has been supplied by circumstantial evidence or permissible inferences requires an examination of all the evidence and a determination of what inferences may properly be drawn. In effect, an extensive "mini-trial" would be required in response to any motion to dismiss a conspiracy indictment on the ground relied upon by the district court in this case. Not only would such proceedings be wasteful of judicial resources; they would be contrary to the underlying assumptions of the constitutional requirement that serious criminal charges be based on a grand jury presentment or indictment. One assumption is that a grand jury will be concerned with the rights of those who may be charged with crimes as well as with determining what offenses have been committed. When a body of citizens, properly chosen and constituted as a grand jury, finds probable cause to believe that a crime has been committed within its jurisdiction, that finding is sufficient to require a trial. The indictment is not evidence, as every petit jury in a criminal case is instructed. The prosecution must still produce evidence from which the trial jury can find every element of the offense proven beyond a reasonable doubt, or the defendant is entitled to a judgment of acquittal. However, the prosecution's evidence is tested at trial, not in a preliminary proceeding.

III.

In ordering disclosure of the grand jury record the district court relied primarily on Rule 6(e), F.R. Crim. P.[3]

[3] F.R.Crim.P. 6(e) provides:

(e) Recording and Disclosure of Proceedings.

(1) Recording of Proceedings. — All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy. — A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to —

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the govern-

and *Dennis* v. *United States*, 384 U.S. 855 (1966). Subsection 2 of Rule 6(e) sets forth the general rule of secrecy and subsection (3)(C) contains the exceptions under which the district court ordered disclosure in the present case. Subsection (3)(C)(i) commits the decision to order disclosure to the discretion of the trial judge. In this respect the Rule follows a long-established principle:

> If follows that the public interest in maintaining the secrecy of the grand jurors' deliberations and the interest of the accused in exposing them may often be in direct conflict. The responsibility of evaluating these conflicting considerations in the interest of truth and justice is a delicate one. It is unthinkable that the decision should be left to the bias of an accused or his counsel, or to the inexperience of a juror. Logically, the responsibility for relaxing the rule of secrecy and of supervising any subsequent inquiry should reside in the court, of which the grand jury is a part and under the general instructions of which it conducted its "judicial inquiry." Cobbledick v. United States, 309 U.S. 323, 327, 60 S.Ct. 540, 84 L.Ed. 783; Hale v. Henkel, 201 U.S. 43, 66, 26 S.Ct. 370, 50 L.Ed. 652. It is a matter which appeals to the discretion of the court when brought to its attention. This has long

---

ment shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

> been the practice and we think it is sound procedural law. Chadwick v. United States, 6 Cir., 141 F. 225, 235; McKinney v. United States, supra; Grace v. United States, 5 Cir., 4 F.2d 658; Murdick v. United States, 8 Cir., 15 F.2d 965, 968; Cox et al. v. Vaught, Judge, 10 Cir., 52 F.2d 562; United States v. American Med. Ass'n, supra; In re Grand Jury Proceedings, D.C., 4 F.Supp. 283.

Schmidt v. *United States*, 115 F.2d 394, 397 (6th Cir. 1940).

However, the discretion of the trial judge in ruling on a motion for disclosure is not absolute. The Supreme Court has established requirements which must be met before the strong policy of maintaining secrecy of grand jury proceedings may be overcome. *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677 (1958), was a civil action brought under § 4 of the Sherman Act. There had been a grand jury investigation, but no indictment had been returned. The defendants sought disclosure of the grand jury transcript pursuant to F.R. Civ. P. Rule 34 (one also moved under Criminal Rule 6(e)). The district court found that since the government was using the transcript in preparation for trial, it would be useful to the defendants as well and that a disclosure order was the only way it could be made available. The Supreme Court reversed the order directing disclosure, holding that there had been no showing by the defendants of the "compelling necessity" required for breaking the "indispensible secrecy of grand jury proceedings." 356 U.S. at 681-82. This compelling necessity must be demonstrated by establishing a "particularized need" rather than a general one. *Id.* at 683.

The requirement of a particularized need for disclosure was reaffirmed by the Court in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1959), a criminal antitrust case where the motion for disclosure was made pursuant to Criminal Rule 6(e): "The burden, however, is on the

defense to show that 'a particularized need' exists for the minutes which outweighs the policy of secrecy." *Id.* at 400. In *Dennis* v. *United States*, 384 U.S. 855 (1966), the Court held that a defendant in a conspiracy case had shown the required "particularized need" for a grand jury transcript. Factors which led to this conclusion were the nature of the case (conspiracy), the passage of time between grand jury appearances and trial, the fact that the portions of the transcript sought covered testimony of key government witnesses and that the testimony of these witnesses, consisting of conversations and oral statements, was largely uncorroborated. *Id.* at 872-73.

In both *Dennis* and *Pittsburgh Plate Glass* the motions were made after the witnesses had testified on direct examination, whereas in the present case disclosure was sought prior to the commencement of trial. Nevertheless, Rule 6(e) authorizes a disclosure order either "preliminarily to or in connection with a judicial proceeding . . . ." The government argues that a 1970 amendment to the Jencks Act, 18 U.S.C. § 3500[4] made grand jury minutes discover-

---

[4] As amended in 1970 the Jencks Act provides:

§ 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means —

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

able only after a grand jury witness had testified at trial, thus depriving a trial court of any discretion to order such disclosure in advance of trial. There is support for this position. *See United States v. Campagnuolo,* 592 F.2d 852, 858 (5th Cir. 1979); *United States* v. *Pelton,* 578 F.2d 701, 709 (8th Cir.), *cert. denied,* 439 U.S. 964 (1978); *cf. United States v. Bruton,* 647 F.2d 818, 823-24 (8th Cir. 1981); *United States* v. *Callahan,* 534 F.2d 763, 766 (7th Cir.), *cert. denied,* 429 U.S. 830 (1976); *United States* v. *Quintana,* 457 F.2d 874, 878 (10th Cir.), *cert. denied,* 409 U.S. 877 (1972). However, we disagree with this reading of the congressional intent.

The Jencks Act generally requires the government, on motion of a defendant, to produce statements in its possession of witnesses who testify at a trial. The defendant is only entitled to the statement after the witness has testified. In *Pittsburgh Plate Glass, supra,* 360 U.S. at 398-99, the Supreme Court construed the Act as having no application to grand jury transcripts. Congress then amended the Act in 1970 to include grand jury testimony within the definition of "statement" as used in subsections (b), (c) and (d) of § 3500. Congress did not include grand jury testimony in the definition of "statement" as used in § 3500(a). Subsection (a) refers to statements or reports in possession of the prosecution made by a government witness *or prospective government witness.* Subsections (b), (c) and (d) refer only to statement of witness who actually testify at the trial and prescribe the procedure for obtaining disclosure of their "statements," including grand jury transcripts, after they have testified. However, the general prohibition in § 3500(a) against requiring disclosure of statements of witnesses until after they have testified does not apply to grand jury testimony. The 1970 amendment by its terms made the definition of "statement" include grand jury testimony only when sought after a witness has testified at trial. The 1970 amendment did not

affect a trial court's discretion to order pretrial disclosure of grand jury testimony. The purpose of the Jencks Act – to give defendants access, *at the trial*, to statements previously made by government trial witnesses – was not changed by the 1970 amendment.[5] The amendment merely made clear that after a government witness has testified, that witness's grand jury testimony, if any, is included among the "statements" which the defendant is entitled to have produced. The Jencks Act does not apply to a motion for pretrial disclosure of a grand jury transcript. *United States* v. *Glassman*, 562 F.2d 954, 957 (5th Cir. 1977); *United States* v. *Budzanoski*, 462 F.2d 443, 454 (3d Cir.), *cert. denied*, 409 U.S. 949 (1972); *see* 8 Moore's Federal Practice ¶6.05[3] at 6-113 (1981). Such a motion is covered by Rule 6(e). The discretion of the trial judge and the requirement of a showing of "particularized need" still govern motions for pretrial disclosure of grand jury transcripts. This conclusion is buttressed by the Supreme Court's decision in *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1978), which applied the "particularized need" requirement to a pretrial motion for disclosure of grand jury transcripts in a case which arose after the 1970 amendment to the Jencks Act. Though *Douglas Oil* was a civil antitrust action, the motion for disclosure was made pursuant to Rule 6(e), F.R. Crim. P. Compare *United States* v. *Proctor & Gamble Co., supra.*

IV.

We conclude that it was an abuse of discretion for the district court in this case to fail to require that the defend-

[5] The legislative history of the 1970 amendment is sparse. However, all five cases referred to in Senate Report No. 91-617 dealt with disclosure motions made at trial. The purpose of the amendment was to establish a uniform procedure for the disclosure of grand jury minutes. There was no indication of any intent to make the Jencks Act control pretrial requests for disclosure.

ants meet the "particularized need" test for disclosure of grand jury transcripts. The court reached its conclusion to order disclosure on the basis of a determination that the "openness" policy of the LMRDA outweighs the need for secrecy of grand jury proceedings, a need referred to by the Supreme Court as "indispensible." *United States* v. *Johnson*, 319 U.S. 503, 513 (1943). The district court found that union members and employees "do not fit the mold" of those who would likely be deterred from giving testimony by the knowledge that it would be divulged. On the contrary, we believe that members and employees of a local union would be particularly concerned about arousing the displeasure of a business agent. From the evidence which we have examined it is clear that Short ran both locals with virtually unchecked authority. He alone notified members of requirements for their services by employers and he made the referrals which resulted in employment. The member witnesses depended on Short for their very livelihood. The employee who testified, an office secretary, was hired by Short and worked in the same office with him. These witnesses were vulnerable and had every reason to desire that their testimony about Short and Riedel[6] be kept secret until they were required to repeat it in open court.

We have found no case where the openness policy of the LMRDA was held to relax the requirement for a showing of particularized need. In *United States* v. *Bertucci*, 333 F.2d 292 (3d Cir.), *cert. denied sub nom. Doherty* v. *United States*, 379 U.S. 839 (1964), a request for disclosure of grand jury testimony at trial (before amendment of the Jencks Act) was denied on the ground that no particularized need had been demonstrated. *Bertucci* was a prosecution for conspiracy to violate the LMRDA. In

[6] Several witnesses testified that Riedel, as secretary-treasurer of Local 27, was the member they relied upon to check and verify Short's claims for expenses.

Budzanoski, supra, the purpose of the LMRDA to provide union members with information about union affairs was discussed. Yet the particularized need requirement was applied to a pretrial motion for disclosure of a grand jury transcript. It has also been held in a civil action under the LMRDA by union members against the union's officers, claiming a violation of fiduciary duties, that section 501 does not provide plaintiffs with a discovery tool. *Gabauer* v. *Woodcock,* 594 F.2d 662 (8th Cir. *en banc*), *cert. denied,* 444 U.S. 841 (1979). If the "openness" policy of the LMRDA would not provide a basis for civil discovery in a case such as *Gabauer,* we do not believe it carries sufficient force to overcome the firmly rooted policy of secrecy of grand jury proceedings. A general claim such as that made by Short that disclosure of grand jury transcripts would reveal exculpatory evidence is not sufficient to satisfy the requirement of a showing of particularized need.

If the assertion that disclosure would reveal exculpatory evidence is true, the rights of the defendants with respect to this material are protected by the Jencks Act and the requirements of *Brady* v. *Maryland,* 373 U.S. 83 (1963). The government has disclosed to the defendants the names of all the witnesses who testified before the grand jury. A *Jencks* motion will bring to the defendants copies of the grand jury testimony of each government witness who testifies at the trial. If the government fails to call any of the grand jury witnesses at trial and the defendants are convicted they will be able to rely on the *Brady* doctrine to argue for reversal claiming that the government has suppressed exculpatory testimony given by these persons before the grand jury. This is not to say that a *Brady* violation may not occur when the prosecution fails to disclose exculpatory material in response to a pretrial motion. The violation may take place at that time, but *Brady* may be invoked only when the trial has been completed. While the problem exists for a prosecutor before and during a trial,

it becomes a concern of the court after the trial has ended. See *United States* v. *Agurs*, 427 U.S. 97, 107-08 (1976). As this court has stated, "*Brady* was never intended to create pretrial remedies." *United States* v. *Moore*, 439 F.2d 1107, 1108 (6th Cir. 1971).

V.

The defendant Riedel argues that he was entitled to have all counts against him dismissed for prosecutorial misconduct. Thus he contends that even if this court should disagree with the reasons given by the district court for dismissing the indictment, we should affirm the dismissal as to him. Riedel argues that he received "equitable immunity" from the prosecution when he was advised that he was not a target of the grand jury's investigation and that he answered questions on the basis of these assurances. An examination of the transcript reveals that Riedel did not testify on the basis of assurances from the prosecutor that he was not a target. Indeed, he invoked his Fifth Amendment privilege against self-incrimination at each of his appearances before the grand jury. The circumstances are entirely different from those disclosed by the opinion in *Rowe* v. *Griffin*, 497 F.Supp. 610 (M.D.Ala. 1980), upon which Riedel bases this argument.

It has been held that the issue of prosecutorial misconduct may not be raised as part of a pretrial appeal. See *United States* v. *Wright*, 622 F.2d 792, 794 (5th Cir.), *cert. denied*, 449 U.S. 961 (1980); but see *United States* v. *Griffin*, 617 F. 2d 1342, 1345 (9th Cir.), *cert. denied*, 449 U.S. 863 (1980); compare *United States* v. *Garner*, 632 F.2d 758, 765 (9th Cir. 1980), *cert. denied*, 450 U.S. 923 (1981). Absent compelling circumstances which would prevent meaningful review following trial, the strong policy of this court against piecemeal review leads to the conclusion that ordinarily a claim of prosecutorial misconduct is reviewable only after trial. However, the district court

made a specific finding on the issue, and forwarded the grand jury transcript to this court under seal. Since we have the entire record before us on the government's appeal, and a clear ruling by the district court on the issue, judicial economy will be served by deciding it at this time. Our examination of the grand jury record convinces us that the district court did not err in finding that the government attorney did not manipulate the grand jury and was not otherwise guilty of prosecutorial misconduct. Though we reverse the judgment of the district court dismissing the indictment, we affirm this holding upon which the defendant Riedel has sought review.

The judgment of the district court is reversed, and the cause is remanded for further proceedings.

Opposition

Office - Supreme Court, U.S.
FILED
MAY 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1954

In the Supreme Court of the United States

OCTOBER TERM, 1981

ADRIAN J. SHORT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1954

ADRIAN J. SHORT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order requiring disclosure to the defense of the entire transcript of the grand jury proceedings that led to the return of the indictment.

Petitioner and co-defendant Earl J. Riedel were charged in a 25-count indictment returned in the United States District Court for the Northern District of Ohio with conspiring to appropriate funds from two local unions for their own use, in violation of 18 U.S.C. 371 (Count 1), and with accepting unlawful expense payments and reimbursements from the unions, in violation of 29 U.S.C. 501(c) (Counts 2 through 25). The district court, after examining the transcript of the grand jury proceedings *in camera*, dismissed Count 1 with prejudice on the ground that the evidence before the grand jury was insufficient to support all elements of the crime. The district court also dismissed Counts 2 through 25 without prejudice after the government

refused to comply with an order requiring disclosure of the entire grand jury transcript to petitioner (Pet. App. A1-A18). The court of appeals reversed (Pet. App. A19-A37).

Petitioner contends (Pet. 6-19) that the district court had discretionary authority to order the disclosure of the grand jury testimony as exculpatory material under *Brady* v. *Maryland*, 373 U.S. 83 (1963). He also contends that the court of appeals erred in ruling that *Brady* was never intended to create pretrial remedies and in concluding that the district court abused its discretion in failing to require that the defendants meet the "particularized need" test for disclosure of grand jury transcripts. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had not dismissed the indictment. If petitioner is acquitted following a trial on the merits, his claims will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed, he will then be able to present his present contentions to the Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him.[1] Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

---

[1]The district court's rulings were entered in the fall of 1980 and were reversed by the court of appeals in February 1982. The trial has thus already been delayed for a year and a half on account of this issue, and we are advised that the district court is awaiting this Court's disposition of the instant petition before proceeding to trial. We accordingly urge the Court, if possible, to act on the petition prior to its summer recess.

[2]Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1982

DOJ-1982-05